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DSL Development Corp Sdn Bhd v Kampong Kita Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-1591–09 OF 2011
MARY LIM J
18 JANUARY 2013

Civil Procedure — Pleadings — Failure to plead — Failure to plead losses — Losses not pleaded to be disallowed

Contract — Termination — Notice of default — Whether letter of termination can be treated as notice of default — Notice of default to be clearly worded

Contract — Termination — Right to terminate — Termination clause providing right to terminate in specified events of default — Termination clause requiring prior notice to remedy of 60 days — Failure to give sufficient notice to remedy — Reason for termination not as provided under termination clause — Whether termination wrongful

Contract — Termination — Termination clause — Termination clause providing right to terminate in specified events of default — Termination clause requiring prior notice to remedy of 60 days — Failure to give sufficient notice to remedy — Reason for termination not as provided under termination clause — Whether termination wrongful

The defendant was the owner of a piece of land ('the land'). The plaintiff entered into a joint venture agreement with the defendant to develop that land into a housing project ('the JVA') at the plaintiff's costs and expense. In reality, the plaintiff was taking over the project from another developer, Urisa Marketing Sdn Bhd ('UMSB'). The plaintiff proceeded with the said project and incurred various costs and expense including a sum of RM630,162.56 to UMSB for revocation of UMSB's joint venture with the defendant. That payment was in the form of a transfer of five units of condominiums. As the plaintiff did not have sufficient funds, it entered into an agreement with other companies for funding. However, the funding arrangements failed. The defendant then by a letter dated 20 December 2010, terminated the JVA with immediate effect on the ground that the plaintiff did not have a valid developer's licence. Aside from denying that it did not have a valid developer's licence, the plaintiff claimed that the termination was unlawful by reason of non-compliance with cl 25 of the said JVA. Clause 25 required the defendant to give 60 days to remedy the default, which the defendant failed to do. The

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plaintiff thus claimed for a return of RM824,809.51 that it had expended on the said project. The defendant claimed that cl 25 and thereby the requirement of a 60 day notice was not in play as the plaintiff had breached cl 10.8 of the said JVA by entering into arrangements with third parties in relation to the JVA without the defendant's knowledge. According to the defendant, that 60 day notice was only required where the plaintiff itself completed the said project. The defendant counterclaimed for the balance sum of RM690,000 which the defendant claimed the plaintiff promised to pay under the JVA and of which the plaintiff had only paid the sum of RM50,000.

Held, allowing the claim and dismissing the counterclaim with costs:

(1) The parties had provided clearly for the right to terminate in cl 25. Implicitly, the defendant had a right to terminate but then only in the five instances or events of default described in cl 25.1. Even in such a situation, the defendant was obliged to first require the plaintiff to remedy or take adequate steps to remedy the relevant default within 60 days after a notice had been given to the plaintiff (see para 23).

(2) The termination was not in accord with cl 25. None of the reasons relied on by the defendant, be it the expiry of the licence or the blacklisting by the Ministry, was within any of the terms and conditions in cl 25.1. That being so, the defendant had no right to terminate the JVA. If at all, the defendant's remedy lay in damages. Hence, the termination was invalid (see paras 38–39).

(3) In any case, a notice of 60 days was a precondition to the exercise of such a right of termination. That period was not given. In addition, the letter of termination could not be treated as the notice of default. A notice under cl 25.1 must be clear in its intention and purport. The event of default must be identified and the plaintiff given the period of 60 days to remedy or take adequate steps to remedy the default. It was only upon the failure to do so after the expiration of 60 days, and not earlier, that the right to terminate arose. Once again, under such circumstances, the termination was invalid by reason of it not being in accord with cl 25 of the JVA (see para 40).

(4) The plaintiff's claim was one for special damages and for which the losses representing the damage must be specifically pleaded and proved. Added to that is the other fundamental principle that parties are bound by their pleadings. It was open to the plaintiff to amend and it chose not to. It was now too late. Since the pleas did not contain these claims, then those losses which were not pleaded must be disallowed. The plaintiff's claim was allowed but only for the sums expended and pleaded (see paras 42 & 45).

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[Bahasa Malaysia summary

Defendan adalah pemilik sebidang tanah ('tanah'). Plaintif memasuki perjanjian usaha sama dengan defendan untuk membangunkan tanah tersebut kepada projek perumahan ('PUS') pada kos dan perbelanjaan plaintif. Sebenarnya, plaintif mengambil alih projek tersebut daripada pemaju lain, Urisa Marketing Sdn Bhd ('UMSB'). Plaintif meneruskan dengan projek tersebut dan mengalami pelbagai kos dan perbelanjaan termasuk sejumlah RM630,162.56 kepada UMSB untuk pembatalan usaha sama UMSB bersama dengan defendan. Bayaran adalah dalam bentuk pindah milik lima unit pangsapuri. Oleh kerana plaintif tidak mempunyai wang yang mencukupi, ia memasuki perjanjian dengan syarikat lain untuk pembiayaan. Walau bagaimanapun, penyusunan pembiayaan tersebut gagal. Defendan kemudiannya melalui surat bertarikh 20 Disember 2010, menamatkan PUS tersebut dengan serta merta atas alasan bahawa plaintif tidak mempunyai lesen pemaju yang sah. Selain daripada menafikan yang ia tidak mempunyai lesen pemaju yang sah, plaintif mendakwa bahawa penamatan tersebut adalah tak sah atas alasan ketidakpatuhan dengan klausa 25 PUS tersebut. Klausa 25 memerlukan defendan memberi 60 hari untuk memberi remedi keingkaran tersebut, yang mana defendan gagal berbuat sedemikian. Plaintif oleh itu menuntut untuk pemulangan sebanyak RM824,809.51 yang telah ia belanjakan untuk projek tersebut. Defendan mendakwa bahawa klausa 25 dan kehendak notis 60 hari tidak dipenuhi memandangkan plaintif telah memungkiri klausa 10.8 PUS tersebut dengan memasuki penyusunan dengan pihak ketiga berkaitan PUS tersebut tanpa pengetahuan defendan. Mengikut defendan, bahawa notis 60 hari tersebut hanya diperlukan di mana plaintif dengan sendiri menyiapkan projek tersebut. Defendan menuntut balas untuk baki jumlah sebanyak RM690,000 yang mana defendan mendakwa plaintif telah berjanji untuk membayar di bawah PUS dan yang mana plaintif hanya membayar sejumlah RM50,000.

Diputuskan, membenarkan tuntutan dan menolak tuntutan balas dengan kos:

(1) Pihak-pihak telah memperuntukkan dengan jelas untuk hak menamatkan dalam klausa 25. Secara tersirat, defendan mempunyai hak untuk menamatkan tetapi hanya dalam lima keadaan atau kejadian keingkaran yang dijelaskan di dalam klausa 25.1. Walaupun di dalam keadaan sedemikian, defendan bertanggungjawab untuk pada mula mengkehendaki plaintif meremedi atau mengambil langkah yang wajar untuk kemungkiran keingkaran yang relevan dalam masa 60 hari selepas notis telah diberi kepada plaintif (lihat perenggan 23).

(2) Penamatan tidak selaras dengan klausa 25. Tiada satupun alasan yang digunakan oleh defendan, sama ada lesen telah tamat atau disenaraihitamkan oleh Menteri, adalah dalam mana-mana terma dan

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syarat dalam klausa 25.1. Walau begitu, defendan tidak mempunyai hak untuk menamatkan PUS tersebut. Jika ia pun, remedi defendan terletak dalam ganti rugi. Maka, penamatan adalah tak sah (lihat perenggan 38 & 39).

(3) Walau bagaimanpun, notis 60 hari adalah pra syarat kepada pelaksanaan hak penamatan sedemikian. Tempoh tidak diberi. Selanjutnya, surat penamatan tidak boleh dianggap sebagai notis keingkaran. Notis di bawah klausa 25.1 mesti jelas dalam niat dan maksudnya. Kejadian keingkaran mesti dikenal pasti dan plaintif diberi tempoh 60 hari untuk meremedi atau mengambil langkah yang wajar untuk meremedikan keingkaran tersebut. Ia hanya apabila kegagalan berbuat sedemikian selepas penamatan 60 hari, dan bukan sebelumnya, bahawa hak untuk menamatkan berbangkit. Sekali lagi, di bawah keadaan sedemikian, penamatan adalah tak sah atas alasan yang ianya tidak selaras dengan klausa 25 PUS tersebut (lihat perenggan 40).

(4) Tuntutan plaintif adalah untuk ganti rugi khas dan yang mana kerugian mewakili ganti rugi mesti diplidkan secara khusus dan dibuktikan. Tambahan kepada prinsip asas yang lain bahawa pihak-pihak terikat oleh pliding mereka. Adalah terbuka kepada plaintif untuk meminda dan ia memilih untuk tidak berbuat sedemikian. Sekarang adalah terlalu lewat. Memandangkan pli tidak mengandungi tuntutan ini, oleh itu kerugian tersebut yang tidak diplid mesti tidak dibenarkan. Tuntutan plaintif dibenarkan tetapi hanya untuk jumlah yang dibelanja dan diplidkan (lihat perenggan 42 & 45).]

Notes

For a case on termination, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 6542.

For cases on failure to plead, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6717–6721.

For cases on light to terminate, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6525–6540.

Cases referred to

Cold Storage Holdings Plc & Ors v Overseas Assurance Corpn Ltd & Anor [1989] 2 MLJ 324, HC (refd)

In re Bird's Trusts (1876) 3 Ch D 214, Ch D (refd)

Oh Hiam & Ors v Tham Kong [1967] 1 MLJ 65 (refd)

Serangoon Garden Estate Ltd v Marian Chye [1959] 1 MLJ 113 (refd)

Shell Timur Sdn Bhd v Achu Belon [1998] MLJU 476; [1998] 2 CLJ 775, HC (refd)

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Legislation referred to

Rules of Court 2012 O 14
Specific Relief Act 1950

Eric Anthony (Eric & Co) for the plaintiff.
Darshan Singh (Jason Singh & Rakan-Rakan) for the defendant.

Mary Lim J:

BACKGROUND FACTS

[1] The defendant is the registered owner of a piece of land situated on HS(D) 2343 PT No 8042, Mukim Setapak, Kuala Lumpur ('the said land'). On 25 September 2011, the plaintiff entered into a joint venture agreement with the defendant to develop that said land ('the said JVA'). The object being 'to build and construct' a housing project on the said land at its own costs and expense ('the said project'). In reality, the plaintiff was taking over the project from another developer, Urisa Marketing Sdn Bhd ('UMSB'). The Datuk Bandar Kuala Lumpur which is the local authority in question had approved the building plans as found in its letter dated 25 June 2005 when the project was still with UMSB.

[2] According to cl 2 of the said JVA, in consideration of the defendant appointing the plaintiff 'as the developer for the overall construction and marketing of the Housing Development', the plaintiff paid the defendant RM50,000.

[3] The plaintiff proceeded with the said project and incurred various costs and expense including a sum of RM630,162.56 to UMSB. This payment was for the revocation of UMSB's joint venture with the defendant and for its revocation of a caveat that it had lodged. That payment was in the form of a transfer of five units of condominiums.

[4] As the plaintiff did not have sufficient funds, it entered into an agreement with another company known as Alpine Green Sdn Bhd ('AGSB') on 12 June 2008. The effect of this agreement was to give AGSB 50% equity in the plaintiff's share of the JVA and for which AGSB was also to bear 50% of the related costs and expense.

[5] However, AGSB failed to meet its promises. Another company known as Kwong Yong Development Sdn Bhd ('KYSB') then stepped in. In effect, KYSB took over AGSB's role. Towards this end, four agreements were made; namely a sale and purchase of equity share in contract; a novation agreement; a deed of assignment and a power of attorney. At the same time, the plaintiff

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entered into sale and purchase agreements with 46 buyers for the housing units that it was developing on the said land.

[6] KYSB breached its agreement with the plaintiff. The plaintiff sued and on 30 June 2011, entered judgment against KYSB.

[7] While the plaintiff had its problems with KYSB, it found itself at odds with the defendant who by letter dated 20 December 2010, terminated the JVA with immediate effect on the ground that the plaintiff did not have a valid developer's licence. The defendant then entered into an agreement with KYSB for the development of the said land along more or less the same lines as the said project which it had concluded with the plaintiff.

[8] Aside from denying that it did not have a valid developer's licence, the plaintiff claimed that the termination was unlawful by reason of non-compliance with cl 25 of the said JVA. Clause 25 required the defendant to give 60 days to remedy the default. It is the failure to remedy such default that, according to the plaintiff, gave the defendant the right to terminate. The plaintiff further claimed that the notice of termination was bad because it was not sent by registered post. The plaintiff further claimed that the defendant's appointment of KYSB had caused the plaintiff loss and damage. It claimed to have also suffered a loss of reputation and its integrity compromised as far as the Ministry of Housing and Local Government was concerned. The plaintiff's claim is for a return of the RM824,809.51 that it expended on the said project together with interests and costs.

[9] The defendant disputed liability. It denied payments by the plaintiff. It alleged that the plaintiff had paid RM630,162.56 to UMSB through contra payments arrangements in the form of five units of condominium as at the material time, the units had not been completed. At para 11 of the defence, it is alleged that the plaintiff did not complete the said project because it did not have a valid sales and advertising permit at the material time. The plaintiff's sales and advertising permit (Permit No 10378-1/1508/2009(08)) for the period between 2 July 2008–27 August 2009 had expired; and the plaintiff's application for its renewal or extension had been refused by the Ministry of Housing. Further, the defendant contended that the plaintiff had been blacklisted by the Ministry. At para 12, aside from admitting that it sent a termination letter dated 1 September 2009, the defendant reiterated its claim that the plaintiff's sales and advertising permit had expired.

[10] The defendant claimed that cl 25 and thereby the requirement of a 60 days notice was not in play as the plaintiff had breached cl 10.8 of the said JVA by entering into arrangements with the third parties in relation to the JVA without the defendant's knowledge. That 60 day notice was only required

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where the plaintiff itself completed the said project. In which case, the defendant claimed that the termination as contained in its letter of 20 December 2010 was valid in law. As for the appointment of KYSB, the defendant claimed that it was forced to so appoint when the plaintiff did not have the sufficient funds and was unable to secure loans from the banks. The defendant claimed that the plaintiff's true objective in the said project was only to secure the project from the defendant and to hand it over to the third parties for a profit.

[11] KYSB finally completed the said project. At para 16, the defendant claimed that if the said project had been handled by the plaintiff, it would not have been completed.

[12] The defendant further counterclaimed for the balance sum of RM690,000 out of the RM740,000 which the defendant claimed the plaintiff promised to pay under cl 2.2 of the JVA and of which the plaintiff only paid the sum of RM50,000.

[13] This is denied by the plaintiff. It further raised the defence of estoppel by reason of the defendant's silence despite knowing of the presence of the third parties at the site of the said project. Such silence is said to amount to acceptance of the plaintiff's arrangements with KYSB. In fact, the defendant is said to have issued letters of consent which were utilised in the plaintiff's dealings with the Ministry of Housing and Local Government. The plaintiff further claimed that the defendant was in collusion with KYSB in removing the plaintiff from the said project.

[14] As for the position of the sales and advertising permit, the plaintiff claimed that it was not renewed due to its fear in incurring liability for late delivery/completion by the house buyers of the said project.

THE FINDINGS

[15] Six issues were agreed for trial:

(a) whether the plaintiff breached the joint venture agreement with the defendant by appointing Alpine Green Sdn Bhd and Kwong Yong Development Sdn Bhd to develop the said land?

(b) whether the defendant wrongfully terminated the joint venture agreement with the plaintiff by not issuing proper and valid termination notices?

(c) whether the termination notices dated 30 October 2009 and 20 December 2010 are valid?

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(d) whether the defendant had knowledge that the plaintiff had appointed a third party to develop the said land?

(e) whether the plaintiff incurred expenses set out in para 6 of the statement of claim? and

(f) whether the plaintiff owes the defendant the balance sum of RM690,000 as per the joint venture agreement?

[16] After viva voce and documentary evidence had been led and from both written and oral submissions of the parties, those issues can be condensed to three issues; the first relating to the validity of the notice of termination; the second, on whether the plaintiff's loss has been proved; and the third, whether the defendant's counterclaim should be allowed.

[17] There are in fact three letters sent by the defendant that warrant scrutiny, namely the letters dated 1 September 2009, 30 October 2009 and 20 December 2010 respectively:

1 September 2009

DSL DEVELOPMENT CORPORATION SDN BHD
Wisma Zelan Suite 12a-23 & 23a,12a Floor
No. 1 Jalan Tasik Permaisuri 2
Bandar Tun Razak
58000 Kuala Lumpur

PERINGATAN

UNTUK MEMPERBAHARUI LESEN IKLAN JUALAN YANG TELAH TAMAT, BERTARIKH 27 OGOS 2009, BAGI CADANGAN MEMBINA PANGSAPURI 14 TINGKAT 135 UNIT, DI ATAS LOT 29116 GM 1885, KAWASAN KG. PADANG BALANG MUKIM SETAPAK, WP KUALA LUMPUR

Dengan hormat merujuk perkara di atas di sini kami ingin memaklumkan kepada pihak tuan agar dapat membaharui lesen iklan jualan yang telah tamat tempohnya dengan kadar secepat mungkin.

Oleh kerana unit-unit pangsapuri ini tidak dapat dijual dan kemungkinan projek ini akan terbengkalai.

Sekian, terima kasih.

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HJ SALLEH DARHAM
Pengarah urusan

30 Oktober 2009

DSL DEVELOPMENT CORPORATION SDN BHD
Wisma Zelan Suite 12a-23 & 23a, 12a Floor
No.1 Jalan Tasik Permaisuri 2
Bandar Tun Razak
58000 Kuala Lumpur

PENAMATAN PERJANJIAN USAHA BERSAMA YANG BERTARIKH 26 SEPTEMBER 2006 BAGI CADANGAN MEMBINA PANGSAPURI 14 TINGKAT 135 UNIT, DI ATAS LOT 29116 GM 1885, KAWASAN KG. PADANG BALANG MUKIM SETAPAK, WP KUALA LUMPUR

Dengan hormatnya merujuk kepada perkara di atas ini.

Kami dengan ini ingin menamatkan usahasama bagi cadangan pembinaan pangsapuri di atas kerana tuan telah gagal membaharui atau melanjutkan lesen pemaju yang telah tamat tempoh pada 27 Ogos 2009 walaupun notis telah dikeluarkan oleh kami sebelum ini.

Kami terpaksa membuat penamatan ini untuk mengelakkan pangsapuri ini daripada terbengkalai.

Kami juga akan melantik pemaju baru bagi mengambilalih pembinaan ini secepat mungkin.

Sekian.

Yang ikhlas

KAMPONG KITA SDN BHD

[18] It is the last letter that is of greatest interest for despite that letter of 30 October 2009, the parties carried on. It is vide the defendant's letter dated 20 December 2010 that the JVA is terminated and it is this letter which is the

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subject of the present claim:

DSL DEVELOPMENT CORPORATION
SDN BHD
Wisma Zelan Suite 12a-23 & 23a, 12a Floor
No. 1 Jalan Tasik Permaisuri 2
Bandar Tun Razak
58000 Kuala Lumpur
U/P: En. William Loh

PERJANJIAN USAHA BERSAMA YANG BERTARIKH 26/9/2006 UNTUK MEMBANGUN HSM 2343 PT 8402 DAERAH KUALA LUMPUR MUKIM SETAPAK TEMPAT KAMPUNG BARU

Kami merujuk kepada perkara yang dinyatakan di atas ini.

Kami telah berulang kali meminta pihak Tuan untuk mematuhi aku janji Tuan sepertimana yang tertera di dalam perjanjian yang dinyatakan di atas ini terutamanya untuk membaharui atau melanjutkan lesen pemaju Tuan.

Sehingga kini kami telah dimaklumkan oleh pihak berkuasa, bahawa pihak Tuan tidak dapat membaharui atau melanjutkan lesen pemaju Tuan kerana gagal mengaudit akaun lesen pemaju berkenaan perkara dinyata di atas ini.

Selain dari itu nama kedua-dua Pengarah Tuan dimasukkan di dalam senarai hitam Kementerian Kerajaan Tempatan dan Perumahan sepertimana yang direkodkan di muka web KPKT.

Atas alasan yang pihak Tuan telah memecah kontrak berkenaan perkara yang dinyatakan di atas ini selepas notis yang begitu banyak kami terpaksa menamatkan perjanjian yang tersebut di atas dengan serta merta.

Kami akan mengambil tindakan untuk melantik pemaju yang baru untuk mengusahakan semula pembanguanan tanah tersebut.

Sekian.
Yang ikhlas,

KAMPONG KITA SDN BHD

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[19] Upon receipt of this last letter, the plaintiff instructed its solicitors to respond. By letter dated 25 January 2011, the solicitors stated for the record that the termination letter of 20 December 2010 was only received on 4 January 2011. The plaintiff also responded that it 'categorically deny all the allegations contained therein and allege that they are baseless and devoid of merits'. The plaintiff further denied receiving any notices from the defendant and 'maintain that your purported attempt to immediately terminate the agreement is unlawful and invalid'. In the same letter, the plaintiff alleged that it was the defendant who was in breach by its collaboration with KYSB.

[20] The parties have provided clearly for the right to terminate. It is found in cl 25; in particular cll 25.1 and 25.4; and that is where there is default of the nature or type described in cl 25.1. Clause 25.1 reads:

> 25. DEFAULT AND TERMINATION OF AGREEMENT
>
> 25.1 Default by Developer. In the event that any of the following events shall occur:
>
> 25.1.1 without reasonable cause the Developer abandons the carrying out of the development of the said Land before completion thereof;
>
> 25.1.2 the Developer fails to pay any sum due under any of the provisions of this Agreement; or
>
> 25.1.3 the Developer goes into liquidation whether compulsory or voluntary (except for the purpose of reconstruction, amalgamation or other similar purpose not involving the realisation of assets) or becomes insolvent; or
>
> 25.1.4 the Developer fails to proceed diligently and regularly with the terms of its obligations under this Agreement; and/or
>
> 25.1.5 the Developer fails to execute the works in accordance with this Agreement; AND the Developer fails to remedy or take adequate steps to remedy such default within sixty (60) days after notice thereof from the Landowner then it shall be lawful for the Landowner to enter upon and take possession of the said Land SUBJECT ALWAYS however in the event of the Landowner exercising its said right of possession, then:
>
> (1) the Developer shall forfeit all payments paid by the Developer towards the account of the joint venture under this Agreement;
>
> (2) the Landowner shall be entitled to deal with or otherwise dispose of the

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said Land in such manner and upon such conditions as the Landowner shall deem fit;

(3) this Agreement shall determine without prejudice to any right of action or other remedy of the Landowner for the recovery of any monies due to the Landowner or in respect of any breach of this Agreement or right or remedy of the Landowner hereunder;

(4) the Developer shall at its own costs and expenses remove or cause to be removed immediately any private caveat or other encumbrances lodged by or for and on behalf of the Developer and/or the Developer's Financier/s within seven (7) days from the date of termination of this Agreement; and

(5) the Developer shall return to the Landowner all documents delivered by the Landowner to the Developer under the provisions of this Agreement intact and unencumbered within seven (7) days from the date of termination of this Agreement;

(6) the Developer shall cease all works on the said Land and remove from the said Land all of his workmen, employees, servants, agents, contractors and subcontractors and vacate the said Land completely;

(7) at the Landowner's discretion upon written notice to the Developer, the Landowner may use any scaffolding, plant or materials of the Developer upon the site for the purpose of and so long as may be reasonable necessary for completion the work and shall not be bound to pay any sum or further sum to the Developer until the time reasonable necessary for completion the work has elapsed ...

(8) the Developer shall hand over to the Landowner who shall be liable to any purchaser of any of the saleable units in the Development and the Developer shall fully indemnify the Landowner in the event of any claims or proceedings instituted by any such purchaser against the Landowner in relation thereof.

[21] Clause 25.4 is another provision providing for the termination of the JVA on 'other events':

> 25.4 Other events of termination. This Agreement may also be terminated in either of the following events:
>
> 25.4.1 upon the completion of the said Housing Development;
>
> 25.4.2 by mutual agreement.

[22] As can be seen, it is not relevant for our present case. The court is actually required to consider the construction and application of cl 25.1 and not cl 25.4.

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[23] From the provisions of cl 25.1, the parties have agreed that the defendant will have the right to 'enter upon and take possession of the said Land'. Implicitly, the defendant has a right to terminate but then only in the five instances or events of default described in cl 25.1. Even in such a situation, the defendant is obliged to first require the plaintiff to remedy or take adequate steps to remedy the relevant default within 60 days after a notice has been given to the plaintiff.

[24] This is a summary of the oral testimonies of the two witnesses who testified: Loh Kok Leong ('PW1') for the plaintiff and Hj Salleh bin Darham ('DW1') for the defendant.

[25] PW1 was the project manager at the material time and was therefore familiar with the facts. He told the court that the defendant's letter of termination of 30 October 2009 referred to the plaintiff's developer's licence which is said to have expired on 27 August 2009. According to him, the plaintiff's developer's licence was valid till 7 August 2012. In the defendant's second letter of termination of 20 December 2010, the defendant relied on the plaintiff's purported failure to renew its developer's licence and being blacklisted by the Ministry of Housing and Local Government as its reasons for terminating the JVA. According to PW1, as at the date of the letter, that is, on 20 December 2010, the plaintiff's developer's licence was still valid. He also denied that the JVA was wholly assigned to KYSB.

[26] PW1 further gave evidence on the various expenditures by the plaintiff. As for the payment to UMSB, the plaintiff provided a letter of undertaking wherein the plaintiff allocated five units as contra of the sum of RM630,162.56 to UMSB. These five units are the plaintiff's allocation under the JVA. However, according to PW1, he believed the five units 'have been sold either by the defendant or Kwong Yong Development Sdn Bhd' and that the debt with UMSB 'has been settled either by the defendant or Kwong Yong Development Sdn Bhd'. The plaintiff is seeking payment from the defendant because 'since the defendant wrongfully terminated the contact and the units which rightfully belong to the plaintiff already sold, the defendant should pay the said sum to the plaintiff'.

[27] In relation to the counterclaim, PW1 denied owing the sum claimed by the defendant because 'any debt owing the Defendant has been taken over by the Kwong Yong Development Sdn Bhd whom the Defendant appointed to replace the Plaintiff. If there is any money owing to the Defendant under the Agreement it must be paid by Kwong Yong Development Sdn Bhd'.

[28] DW1 is a director with the defendant. He testified that the termination was because the plaintiff did not renew its sales and advertising licence; and

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because the plaintiff had blacklisted by the Ministry. The error of the plaintiff's developer's licence was, according to DW1, 'silap teknikal' and that the defendant only realised its error 'dalam masa yang terdekat ini'.

[29] For a start, it may be possible that what the defendant intended to refer to was the sales and advertising permit; and not the developer's licence. The permit appears at p 67 of bundle A: it is valid for one year from 28 July 2008–27 August 2009. As testified by DW1, the defendant only realised its error lately. Be that as it may, it is not probable in the facts of this case. First, I find it extremely difficult to believe that given the contents of the three letters which I have just highlighted. As far back as 2009, the defendant in its own earlier letter dated 1 September 2009 had requested the plaintiff to renew its advertising and sales licence or permit (see agreed fact No 9). In its first letter of termination of 30 October 2009, the defendant had also referred to the plaintiff's developer's licence which was said to have expired on 27 August 2009.

[30] Furthermore, at the time the defendant wrote a second letter of termination (and that forms the subject matter of the claim today), the defendant reiterated the same basis for the termination; that it is the plaintiff's failure to renew its developer's licence. Nothing is mentioned of the sales and advertising permit. When the plaintiff disputed the termination through its lawyers, the defendant did nothing. The defendant's explanation is feeble and unacceptable; its conduct quite inconsistent with its contentions today in court. Surely in a matter of such far-reaching implication as bringing a JVA to an end and affording the parties various rights and obligations, it is reasonable to expect more care to have been taken.

[31] From the pleadings identified earlier, I have also pointed out that the expiry of the sales and advertising permit was pleaded and re-emphasised in several parts of the defence. At this point, the defendant has legal representation. Yet, none of this is raised in the defence.

[32] Learned counsel for the defendant has invited the court to exercise its powers of rectification and rescission on account of mistake. He argued that where by a mistake a written instrument does not accord with the true agreement between the parties, equity has the power and the court has discretion to reform, or rectify that instrument so as to make it accord with the true agreement, and order specific performance of the rectified agreement. He has further relied on the provisions of the Specific Relief Act 1950.

[33] It was the submission of learned counsel that when, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest,

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may institute a suit to have the instrument rectified. If the court finds it clearly proved that there has been such a mistake or fraud in framing the instrument, and if the real intention is ascertained, then the court may in its discretion rectify the instrument so as to express that intention, so far as can be done without prejudice to rights acquired by third persons in good faith and for value. Learned counsel relied on the decisions of *Oh Hiam & Ors v Tham Kong* [1967] 1 MLJ 65 and *Serangoon Garden Estate Ltd v Marian Chye* [1959] 1 MLJ 113 in support of his contentions.

[34] With the greatest respect, I do not see how rectification arises. There is first and foremost no plea of mistake or a prayer to that effect anywhere in the defence and counterclaim filed. This part of the submissions therefore cannot be entertained.

[35] The 'technical error' that DW1 speaks about is also articulated for the first time at trial; and even then only in cross-examination. The circumstances for a rectification under the conditions described by learned counsel are entirely different from those present here. There is no mistake and no fraud here.

[36] There is furthermore no instrument to rectify. The letter(s) written by the defendant itself cannot and does not fall within the meaning of instrument as envisaged by equity. It is only where the instrument or document that was drawn up does not accord with the true agreement between the parties that the terms of the instrument are revisited. For example, a contract, a deed or an insurance policy (see *In re Bird's Trusts* (1876) 3 Ch D 214; *Cold Storage Holdings Plc & Ors v Overseas Assurance Corpn Ltd & Anor* [1989] 2 MLJ 324; *Shell Timur Sdn Bhd v Achu Belon* [1998] MLJU 476; [1998] 2 CLJ 775). A letter(s) and certainly one of the type under discussion which is written by the defendant itself is well outside the ambit of this invocation. The submissions in this regard are therefore rejected.

[37] I must say that it is somewhat peculiar that there be as many as two letters of termination. If there is termination by the first letter, then that should be the end of the matter. By the defendant's own conduct that first purported letter of termination actually has no effect as the parties carried on with the implementation of the JVA for just over a year till the termination issued by letter dated 20 December 2011.

[38] Having made that observation, it is apparent from the contents of both the letters of termination, especially that found in letter dated 20 December 2011; I further do not find the termination being in accord with cl 25. None of the reasons relied on by the defendant (be it the expiry of the licence or the blacklisting by the Ministry) is within any of the terms and conditions in

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cl 25.1. That being so, the defendant has no right to terminate the JVA. If at all, the defendant's remedy lies in damages.

[39] Under such circumstances, the termination is invalid. The defendant has no right of termination for the reasons that are cited in the JVA.

[40] In any case, a notice of 60 days is a precondition to the exercise of such a right of termination. That period was not given. The defendant has referred to earlier notices. Regretfully, none were referred to or shown during the trial. The court cannot treat any of the two earlier letters mentioned above as being within the meaning or serving the purpose of a notice. In addition, the letter of termination cannot be treated as the notice of default. A notice under cl 25.1 must be clear in its intention and purport. The event of default must be identified and the plaintiff given the period of 60 days to remedy or take adequate steps to remedy the default. It is only upon the failure to do so after the expiration of 60 days, and not earlier, that the right to terminate arises. Once again, under such circumstances, the termination is invalid by reason of it not being in accord with cl 25 of the JVA.

[41] Next, the claim for loss and damage. The defendant had submitted that some of the plaintiff's claims are not pleaded. To this, the plaintiff had argued that it is open to the court to exercise its discretion and allow those claims anyway as there is 'no radical departure but a mere development of what had been alleged by the Plaintiff'.

[42] With respect, the court disagrees with the submission of learned counsel for the plaintiff that the court exercises its discretion to allow the claims anyway on the ground of no radical departure. The plaintiff's claim is one for special damages and for which the losses representing the damage must be specifically pleaded and proved. Added to that is the other fundamental principle that parties are bound by their pleadings. It was open to the plaintiff to amend and it chose not to. It is now too late. Since the pleas do not contain these claims, then those losses which are not pleaded must be disallowed.

[43] Nevertheless, in respect of those losses which have been pleaded, I am satisfied that the plaintiff did expend for those items claimed. Other than PW1's oral testimony which I find unchallenged; there is his earlier evidence in the form of an affidavit filed in support of the plaintiff's O 14 application. As for the plaintiff's claim for the sum of RM630,162.56, it is really a claim for its share under the JVA. My difficulty with this claim is that it is claimed as a 'refund'. This means that there must be evidence of the plaintiff's payment in order to secure the corporate guarantee. The plaintiff did not produce any evidence of this guarantee and it cannot because it did not provide that guarantee. So, immediately, the plaintiff's claim here must fail. Further, and

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more significantly, PW1 himself testified that UMSB's debt had been settled; either by the defendant or KYSB.

[44] In reality, the plaintiff is claiming for its entitlement under the JVA. And, this is confirmed by PW1's testimony — see Q & A 40–42. But, that is not how the plaintiff's claim is pleaded. It is for return of a fixed sum of monies paid by the plaintiff. As such, this is not claimable. In any case, the letter of undertaking, if any was provided by the plaintiff, was not realised by UMSB. There is therefore no loss suffered by the plaintiff in this respect.

[45] In the circumstances, the plaintiff is allowed but only for the sums expended and pleaded less the payment for the five units. Such sum shall carry the rate of interest of 5%pa from the date of judgment to the date of realisation. The court therefore allows the claim for the losses claimed and proved, namely para 6(ii), (iii), and (iv)(a)–(e) only. The total amount being RM83,646.95.

[46] In respect of its counterclaim, the defendant claimed that by reason of the assignment or arrangement with a third party for the completion of the said project, the plaintiff was in default. The defendant therefore was entitled to terminate the said JVA.

[47] From the second letter identified above, it is clear that the defendant had already decided to enter into arrangements with KYSB as early as 30 October 2009. By this letter, the defendant, inter alia, informed the defendant that it would be appointing a new developer so that the project was not regarded as an abandoned project.

[48] From agreed fact ten, the parties agreed that the defendant had appointed KYSB on 1 and 5 November 2009. But, on or by these dates, the JVA had yet to be terminated. Furthermore, it is obvious from the contents of the defendant's letter of 30 October 2009, that the defendant was going to appoint a new developer not because the plaintiff had assigned the JVA to a third party but because of the plaintiff's failure to renew its developer's licence. Nothing is mentioned about the plaintiff having entered into arrangements with the third parties. Hence, the basis of the counterclaim must fail. The court is therefore compelled to dismiss the counterclaim.

[49] I am further directing the defendant to pay the plaintiff the sum of RM15,000 as costs. I am of the view that this amount is both reasonable and appropriate.

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Claim allowed and counterclaim dismissed with costs.

Reported by Kanesh Sundrum